No. 96-1482

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1996

LEXECON INC., et al.,
Petitioners,
v.
MILBERG WEISS BERSHAD HYNES & LERACH,
A PARTNERSHIP, et al.,
Respondents.

Supreme Court, U.S.
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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE REGENTS OF THE UNIVERSITY OF CALIFORNIA AS *AMICUS CURIAE* SUPPORTING PETITIONER

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BRIEF OF THE REGENTS OF THE UNIVERSITY OF CALIFORNIA AS AMICUS CURIAE SUPPORTING PETITIONER

STATEMENT OF INTEREST

The University of California is one of the world's premier institutions of research and education. It is also an instrumentality of the State of California entitled to sovereign immunity[1] and an occasional litigant in federal court. The University has a two-fold interest in the resolution of this case: (1) it has a vital interest in ensuring that the federal district courts' application of the multidistrict transfer statute does not violate the University's sovereign immunity

[1] *See Regents of the Univ. of California v. Doe*, 117 S. Ct. 900 (1997).

under the Eleventh Amendment of the United States Constitution; (2) it has an interest in ensuring that federal judges do not overstep their authority in applying the laws, even when following a plain statutory command may appear inconvenient or inefficient.

The University's experience with multidistrict transfer in a case now pending before the Federal Circuit tellingly demonstrates how a district court's failure to follow the plain language of section 1407 leads to violation of its Eleventh Amendment rights. In 1990, the University filed suit for patent infringement against Eli Lilly & Co. in the Northern District of California. Lilly sought transfer of the litigation to Indiana, which the California court denied. *Regents of the Univ. of California v. Eli Lilly & Co.*, 734 F. Supp. 911 (N.D. Cal. 1990). In 1992, however, the Judicial Panel on Multidistrict Litigation transferred the action to the Southern District of Indiana for coordinated pretrial proceedings pursuant to 28 U.S.C. § 1407, and the court of appeals for the Federal Circuit denied the University's petition for a writ of mandamus from that order. *In re Regents of the Univ. of California*, 964 F.2d 1128 (Fed. Cir. 1992). In 1994, in response to a motion by Lilly under section 1404(a), the Indiana court transferred the University's suit to itself over the University's objections.

The Indiana court's self-transfer forced the University to trial in Indiana although the University never consented to trial in that jurisdiction. The propriety of the Indiana court's self-transfer is now pending before the Court of Appeals for the Federal Circuit. The University argued that self-transfer by the Indiana court violates both the University's sovereign immunity under the Eleventh Amendment and the plain language of section 1407. The University has also notified the Court of Appeals that this Court granted *certiorari* in this case.

This Court's resolution of the question presented in this case will have a significant impact on the rights of every State and sovereign State entity to select a forum for litigation. This Court has repeatedly emphasized the importance of the Eleventh Amendment in our constitutional framework. Yet, as the University's case against Lilly demonstrates, district courts acting in violation of the plain language of section 1407 have impaired its Eleventh Amendment rights.

The University also has a keen interest in ensuring that judges follow the law. By practicing self-transfer in violation of the plain language of section 1407, courts impermissibly act beyond the scope of their authority. The University litigation, along with the many cases of self-transfer cited in the petition for *certiorari* and by the court below in this case, shows an urgent need for this Court to reaffirm the fundamental principle that federal judges must follow the plain language of the laws passed by Congress.[2]

SUMMARY OF ARGUMENT

Judicial misapplication of sections 1404 and 1407 upsets our constitutional framework two ways. First, it violates the Eleventh Amendment rights of sovereign States. The Eleventh Amendment prevents adverse parties from forcing sovereign State entities to litigate in a federal court unless either the sovereign has consented or Congress has explicitly abrogated sovereign immunity. To enforce rights over which federal courts have exclusive jurisdiction, a sovereign may choose to file suit in a particular federal district court, but this Court's prohibition against implied waivers of Eleventh Amendment immunity prevents sovereigns from then being forced to trial in a different federal jurisdiction by a multidistrict court's self-transfer.

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[2]Written consent to the filing of this brief has been obtained from the parties and is lodged herewith.

Second, in granting motions for self-transfer under section 1404, section 1407 transferee courts overstep the bounds of legitimate statutory interpretation and rewrite the law to suit their own convenience. The doctrine of separation of powers requires judges to follow federal law. While there may be cases where it is difficult to discriminate between legitimate statutory construction and illegitimate legislation in the guise of interpretation, this is not one of them. Section 1407 is unmistakably clear: cases consolidated for pretrial proceedings must be remanded to their originating districts at or before the end of those proceedings. Section 1404 is equally clear in prohibiting self-transfer.

ARGUMENT

I. "SELF-TRANSFER" IS INCONSISTENT WITH ELEVENTH AMENDMENT IMMUNITY.

Eleventh Amendment sovereign immunity provides a jurisdictional limit to the power of the federal courts. For over a century, this Court has "reaffirmed that federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.'" *Seminole Tribe v. Florida,* 116 S. Ct. 1114, 1122 (1996) (quoting *Hans v. Louisiana,* 134 U.S. 1, 15 (1890)); *see also Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 98 (1984).

To enforce its patent rights, the University must sue in federal court. 28 U.S.C. § 1338(a). As a sovereign protected by the Eleventh Amendment, the University is entitled to select the forum in which it will proceed to trial:

> [I]ssues of venue are closely related to those concerning sovereign immunity, as this Court has indicated by emphasizing that "[a] State's constitutional interest in immunity encompasses not

> merely *whether* it may be sued, but *where* it may be sued."

Port-Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 307 (1990) (quoting *Pennhurst,* 465 U.S. at 99 (emphasis in original)); *see also Idaho v. Coeur d'Alene Tribe of Idaho,* 65 U.S.L.W. 4540, 4543 (Jun. 23, 1997) ("States have real and vital interests in preferring their own forum in suits brought against them, interests that ought not to be disregarded based upon a waiver presumed in law and contrary to fact").

Self-transfer by section 1407 transferee courts under section 1404 without the consent of litigants entitled to Eleventh Amendment immunity deprives sovereigns of their rights to select a forum for litigation. That practice cannot be squared with this Court's prohibition against implied waivers of Eleventh Amendment rights: "Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here." *Edelman v. Jordan,* 415 U.S. 651, 673 (1974). Because Eleventh Amendment immunity is an "essential component of our constitutional structure," *Dellmuth v. Muth,* 491 U.S. 223, 228 (1989), this Court has long held that a State's waiver of its immunity must be "unequivocally expressed," *Pennhurst,* 465 U.S. at 99, or found by "'such overwhelming implications . . . as [will] leave no room for any other reasonable construction.'" *Edelman,* 415 U.S. at 673 (quoting *Murray v. Wilson Distilling Co.,* 213 U.S. 151, 171 (190[illegible])). Although a State consents to the jurisdiction of the court in which it chooses to bring suit, *Clark v. Barnard,* 108 U.S. 436, 447 (1883) (State's "appearance in a court of the United States would be a voluntary submission to *its* jurisdiction" (emphasis added)), such a waiver must be narrowly construed and cannot be interpreted as a general consent to trial in any venue in the United States.

Judicial misapplication of section 1407 threatens to eliminate sovereigns' Eleventh Amendment rights in many important areas of federal legislation where federal courts have exclusive jurisdiction, including patent, antitrust, securities, and environmental actions. *See, e.g.*, 15 U.S.C. §§ 15(a) (Clayton Act), 78aa (Securities Exchange Act of 1934); 28 U.S.C. § 1338(a) (Patent cases); 42 U.S.C. § 9613(b) (CERCLA). As the House Report on section 1407 notes, such actions are particularly appropriate candidates for consolidated pretrial proceedings. "The types of cases in which massive filings of multidistrict litigation are reasonably likely to occur include not only civil antitrust actions but also, [sic] common disaster (air crash) actions, patent and trademark suits, products liability actions and securities law violation actions, among others." H.R. Rep. No. 1130 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1898, 1900.

To prevent the loss of an immunity that is an essential part of our constitutional scheme and to preserve the States' sovereign rights to select a forum for litigation, cases in which pretrial proceedings are consolidated under section 1407 should be remanded for trial to the originating district, as Congress clearly intended.

II. "SELF-TRANSFER" VIOLATES THE LIMITED POWER OF ARTICLE III JUDGES TO INTERPRET FEDERAL LAWS.

Federal judges play an essential role in interpreting the United States Constitution and federal law, but they cannot overstep the bounds of legitimate interpretation and rewrite laws to suit their own convenience. Judicial overreaching occurs in cases of multidistrict self-transfer.

A. The Separation of Powers Doctrine and the Limited Authority of Article III Judges Require Federal Judges to Follow Clear Statutory Language.

By granting motions for self-transfer of cases consolidated under section 1407 for pretrial proceedings, federal judges disregard a plain statutory mandate. Federal judges, no less than presidents, *see Clinton v. Jones*, 137 L. Ed. 2d 945 (1997); *United States v. Nixon*, 418 U.S. 683 (1974), must comply with the laws passed by Congress, whether those judges disagree with the wisdom, convenience, or efficiency of the law. "'The doctrine of separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power.'" *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 613-14 (1952) (Frankfurter, J., concurring) (quoting *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J.)).

The tripartite structure of our Federal Government prevents federal judges from acting on their own beliefs about the desirability of laws that Congress enacted.

> Our province is to declare what the law is, and not, under the guise of interpretation or under the influence of what may be surmised to be the policy of the Government, so to depart from sound rules of construction as in effect to adjudge that to be law which Congress has not enacted as such.

Dewey v. United States, 178 U.S. 510, 521 (1900) (Harlan, J.). As James Madison explained, "[t]he judges can exercise no executive prerogative, though they are shoots from the executive stock, nor any legislative function, though they may be advised with by the legislative councils." *The Federalist* No. 47, at 326 (James Madison) (Jacob E. Cooke, ed. 1961). The separation of legislative and judicial powers has long been described as essential to prevent the arbitrary application of justice and is deeply embedded in

the philosophical roots of our government's structure: "'Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul, for *the judge* would then be *the legislator*.'" *Id.* (quoting Baron de Montesquieu, emphasis in original).

The requirement that district court judges stay within the boundaries of power prescribed by Congress is particularly acute in matters of jurisdiction and venue. District courts are created by statute, *see* 28 U.S.C. § 132, and have no power except that given by Congress. "[C]ourts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction." *Finley v. United States*, 490 U.S. 545, 547 (1989) (quoting *Ex parte Bollman*, 4 Cranch 75, 93 (1807)); *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850) ("Courts created by statute can have no jurisdiction but such as the statute confers"); *see also* 28 U.S.C. §§ 1330-1368. A district court's ability to conduct coordinated and consolidated pretrial proceedings derives from the power provided by Congress in section 1407. The power to try such cases after the end of those proceedings was withheld from multidistrict transferee courts by the plain language of section 1407.[3]

There may be cases where it is hard to discern the line between legitimate statutory construction and illegitimate

[3]This Court's decision in *Caterpillar, Inc. v. Lewis*, 117 S. Ct. 467 (1996), is consistent with this principle. In *Caterpillar*, the Court refused to vacate a judgment where diversity jurisdiction was lacking early in the proceedings but existed before trial because the nondiverse party had been dismissed. The Court held that when judgment is entered following trial in a case where a jurisdictional defect had been cured, "considerations of finality, efficiency, and economy become overwhelming." *Id.* at 476. In contrast, the court explained that "if, at the end of the day and case, a *jurisdictional* defect remains uncured, the judgment must be vacated." *Id.* at 477. The district court's wrongful transfer in this action was not cured, and under *Caterpillar* the judgment must be vacated.

judicial legislation in the guise of interpretation, but this is not one of them. Self-transfer plainly falls into the latter category. Whether self-transfer promotes efficiency and comports with other federal venue statutes is a matter for Congress, not the Courts, to decide. To date, Congress has chosen not to permit self-transfer.

B. The Plain Language and Legislative History of Section 1407(a) Require That Transferred Multidistrict Cases Be Remanded for Trial.

Congress wrote section 1407 to compel the return of actions transferred for coordinated pretrial proceedings to their originating districts for trial: "Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred." 28 U.S.C. § 1407(a). This decision was deliberate. The House Report to the original section 1407 noted:

> If proposed section 1407 should be enacted and future experience justifies extending it to include consolidation and coordination for trial purposes as well, only minor amendments to the present language of the bill will be necessary.

H.R. Rep. No. 1130, *reprinted in* 1968 U.S.C.C.A.N. 1898, 1902. Congress has amended section 1407, but has never chosen to allow self-transfer. Indeed, a 1991 proposal suggested altering section 1407 to allow trial in the section 1407 transferee court of multidistrict litigation stemming from airline crashes, hotel fires and other similar accidents. H.R. 2450, 102d Cong., 137 Cong. Rec. H 11261-264 (daily ed. Nov. 25, 1991). This proposal passed the House, but was

never acted upon by the Senate. H.R. Rep. No. 102-1085, at 117-18 (1992).[4]

Statutes should be interpreted to "mean what they say." *Barnett Bank of Marion County v. Nelson*, 116 S. Ct. 1103, 1109 (1996). Applying the principle that judges must enforce the law as Congress passed it, this Court in *Finley*, 490 U.S. at 547, rejected an interpretation of the "against the United States" requirement of the Federal Tort Claims Act that departed from the plain statutory language.

> [The FTCA] does not say 'civil actions on claims that include requested relief against the United States,' nor 'civil actions in which there is a claim against the United States,' — formulations one might expect if the presence of a claim against the United States constituted merely a minimum jurisdictional requirement, rather than a definition of the permissible scope of FTCA actions.

Finley, 490 U.S. at 552.

Practical considerations also did not override plain statutory language in *Dewey*, 178 U.S. at 510. There, the Court determined that interpretation of a war-time bounty statute which provided "one hundred dollars, if the enemy's vessel was of inferior force, and two hundred dollars if of equal or superior force," depended solely on the number of ships, not on the presence of "land batteries, mines and torpedoes." *Id.* at 519-20.

> There is undoubtedly force in the suggestion that in rewarding officers and sailors who have sunk or

[4]Nor should this Court interpret Congress' failure to "clarify" the law after courts began to disregard the plain statutory language as an endorsement of the practice of self-transfer. "[W]e have frequently cautioned that 'it is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.' " *United States v. Steele*, 117 S. Ct. 921, 929-30 (1997) (citations omitted).

> destroyed the enemy's vessels in a naval engagement it is not unreasonable that all the difficulties, of every kind, with which they were actually confronted when engaging the enemy should be taken into consideration. But that was a matter which we cannot suppose was over-looked by Congress; and we are not at liberty to hold that it proceeded upon the broad basis suggested, when it expressly declared that the amount of its bounty shall depend upon the question whether "the enemy's vessel" — not the enemy's vessel and land batteries, mines and torpedoes, by which it was supported — was of inferior or of equal or superior force.

Id. at 520.

So too for section 1407. Had Congress intended self-transfer by section 1407 transferee courts, it would have said so.[5] *See* 15 Wright, Miller & Cooper, *Federal Practice & Procedure*, § 3866, at 620 (2d ed. 1986) ("If the experience in handling multidistrict litigation indicates that maximum efficiency can be obtained by allowing some cases to be transferred for consolidated trial, as well as pretrial management, then the statute should be amended to specifically so provide.").

The plain meaning of section 1407 is reinforced by its purpose as explained in its legislative history. Multidistrict coordination of pretrial proceedings grew out of the federal courts' experience with coordinated discovery in antitrust actions brought against electrical equipment manufacturers

[5]Even the commentaries cited by respondent note that self-transfer was not contemplated by Congress when it enacted § 1407. See Ragazzo, *Transfer and Choice of Federal Law: The Appellate Model*, 93 Mich. L. Rev. 703, 704-05 (1995) (intent of § 1407 to remand cases to originating districts for trial); Marcus, *Confronting the Consolidation Conundrum*, 1995 B.Y.U. L. Rev. 879, 885 (section 1407 transfer was "supposed to be limited to pretrial handling of cases").

in the early 1960s. H.R. Rep. No. 1130, *reprinted in* 1968 U.S.C.C.A.N. 1898, 1899. This practice was limited to matters affecting pretrial depositions and document collection and storage. *Id.* When Congress drafted section 1407, it meant to provide a statutory basis for this type of consolidated pretrial practice. "The purpose of [section 1407] is to furnish statutory authority for the kind of pretrial consolidation and coordination successfully implemented in the electrical cases." *Id.* Congress also explicitly defined "'pretrial proceedings'" as "the practice and procedure which precede the trial of an action. These generally involve deposition and discovery, and, of course, are governed by the Federal Rules of Civil Procedure." *Id.* at 1900.

Congress' requirement that cases transferred for consolidated pretrial proceedings be returned to their originating districts at or before the end of those proceedings must be enforced.

C. Courts Cannot Avoid Their Constitutional Obligation to Follow Section 1407 by Misapplying Section 1404.

Judicial disregard for the clear mandate of section 1407 cannot be justified by a twisted application of section 1404, the general venue transfer statute. Section 1404 provides that: "[f]or the convenience of the parties and witnesses, in the interests of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a).

Self-transfer is not a "transfer . . . to any other district" in any logical or linguistic sense. According to *Webster's,* to "transfer" is "1 a: to convey from one person, place or situation to another: transport; b: to cause to pass from one to another: transmit; . . . 2: to make over the possession or control of: convey; . . . —vi 1: to move to a different place, region, or situation . . ." *Merriam Webster's Collegiate Dictionary* at 1253 (10th ed. 1995). "Other" is defined as "1 a: being the one (as of two or more) remaining or not included . . .; b: being the one or ones distinct from that or those first mentioned or implied . . . ; c: second . . . ; 2: not the same: different." *Id.* at 823.

A section 1407 transferee court acquires possession of the case it receives for pretrial proceedings, albeit with a statutory mandate to remand the case to the originating district court at or before the conclusion of those proceedings. J.P.M.L. Rule 19(a) ("the clerk of the transferor district court shall forward to the clerk of the transferee district court the complete original file"). By retaining the case on a motion to transfer under section 1404, the court is neither affecting a "transfer," nor sending the case to "any other district."

This analysis is not simply an exercise in linguistic formalism. As noted by the dissenting judge below, and as evidenced in the legislative history of section 1407, Congress deliberately chose not to include self-transfer among the procedural options available in multidistrict litigation. Although the House Report on section 1407 acknowledged the availability of transfer motions under section 1404 in cases subject to multidistrict transfer, Congress anticipated that such motions would be brought in the court in which the action was originally filed, as an alternative to pretrial consolidation. "Of course, 28 U.S.C. § 1404, providing for changes of venue generally, is available in those instances where transfer of a case for all purposes is desirable." H.R. Rep. 1130, *reprinted in* 1968 U.S.C.C.A.N. 1899, 1902. The very next sentence in the House Report notes that pretrial consolidation would *not* include transfer of cases for trial, precluding self-transfer by the section 1407 transferee court. *Id.* ("If . . . future experience justifies . . . consolidation and coordination for trial purposes as well, only minor amendments to the present language of the bill will be necessary").

Limiting section 1404 transfers to those allowed by the plain statutory language not only confines federal judges to their proper sphere of authority, *see In re American Continental Sec. Litig.*, 102 F.3d 1524, 1546 (9th Cir. 1996) ("The issue has been noted by commentators, and they have all concluded that self-transfer is not authorized by section 1404(a)") (Kozinski, J., dissenting), it also protects a plaintiff's interest in selecting a forum to litigate. *Id.* at 1546-57. "[A]s section 1404(a) is normally interpreted, a plaintiff's choice of forum can only be overcome if the transferee district is clearly more advantageous than the transferor district." *Id.* at 1547. This interest is particularly strong when the plaintiff is a sovereign protected by the Eleventh Amendment. The wrongful application of section 1404 cannot cure a violation of section 1407.

CONCLUSION

Amicus requests that the decision of the court below be reversed and that the transfer be vacated with directions to remand the case to the forum selected by petitioner.

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